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CASE NUMBER _____

In The
Supreme Court of The United States
OCTOBER TERM, 1981

RAYMOND, JAMES AND ASSOCIATES, INC., *PETITIONERS*

v.

ROGER L. SUMMER

ON APPEAL FROM THE UNITED STATES COURT OF APPEAL FOR THE FORMER FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Correction: Opinion below of the Former Fifth Circuit Court of Appeals is reported at 664. F.2d 965.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

No.

Raymond, James and Associates, Inc.,

Petitioners

vs.

Roger L. Summer

Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Former Fifth Circuit

RAYMOND, JAMES AND ASSOCIATES, INC.,

petitions for a writ of certiorari

to review the order of the Former Fifth Circuit in this case

QUESTIONS PRESENTED FOR REVIEW

1. MAY THE PLAINTIFF INVESTOR CLAIM BENEFIT OF THE EQUITABLE TOLLING DOCTRINF WHEN HIS PLEADING SHOWS HE WAS AWARE OF CIRCUMSTANCES REQUIRING PROPER INVESTIGATION BEFORE THE EXPIRATION OF THE STATUTES OF LIMITATIONS.

2. MAY THE COURT DETERMINE ON A MOTION TO DISMISS THAT A PLAINTIFF INVESTOR'S ACTION CLAIMING FRAUD IS BARRED BY THE STATUTE OF LIMITATIONS NOT TOLLED BECAUSE CIRCUMSTANCES ARE SHOWN ON THE FACE OF THE COMPLAINT REQUIRING PROPER INVESTIGATION AND TIMELY ACTION.

PARTIES TO THE CASE

- The Petitioner, RAYMOND, JAMES AND ASSOCIATES, INC., was a defendant below.
- The Plaintiff below, ROGER L. SUMMER
- Defendant below, ARTHUR YOUNG AND COMPANY
- Defendant below, GUY BAILEY, SR.
- Defendant below, GUY BAILEY, JR.
- Defendant below, ROBERT LITTLE
- Defendant below, JEROME GROSSMAN
- Defendant below, ARECA STONE BAILEY
- Defendant below, CHARLOTTE BABCOCK
- Defendant below, ROBERT R. FISCHER

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The opinion of the Former Fifth Circuit Court of Appeals (Appendix A-1) is not yet reported (Case #80-5297 5th Cir., December 28, 1981). The opinion of the District Court (Appendix A-14) is not reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on December 28, 1981. Motion for Rehearing filed by co-defendant, ARTHUR YOUNG & COMPANY was denied by Order rendered January 29, 1982 (Appendix A-13). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Suit was based on alleged violations of sections 11, 12 (2) and 17 of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77l(2) and 77q), § 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. § 78j(b), Rule 10(b)-5 of the Securities and Exchange Commission, Florida Blue Sky Law F.S. §§ 517.021 and 517.301, and claims of common law causes. Copies of the relevant sections are attached as Appendix "B."

STATEMENT OF CASE

On June 17, 1971, a public offering was made for both common stock and debentures of LAND AND LEISURE, INC., a private company in the business of buying undivided tracts of land in Florida for subdivision and resale to individual purchasers. The Petitioner, RAYMOND, JAMES AND ASSOCIATES, INC., was retained as lead underwriter for the public offering.

Beginning June 24, 1971 and for a period ending January 3, 1973, the Plaintiff below ROGER L. SUMMER, hereinafter "SUMMER," allegedly purchased in the over-the-counter market some 9,500 shares of the common stock of LAND AND LEISURE, INC. Plaintiff's complaint sets forth purchases as being on the following dates:

Date	Amount
June 24, 1971	3,000.00
	600.00
July 20, 1971	400.00
August 5, 1971	500.00
August 6, 1971	500.00
October 2, 1972	500.00
October 26, 1972	500.00
November 10, 1972	500.00
November 20, 1972	500.00
December 20, 1972	500.00
December 27, 1972	1,000.00
January 3, 1973	1,000.00

(Appendix A-22)

Plaintiff, SUMMER became suspicious regarding his investment when he noticed no shareholders' meeting had taken place in 1971 or any subsequent year and he received no annual reports for 1971 or any subsequent years. His inquiries to various defendants not being fruitful he filed suit in state court in 1977 seeking corporate records. On February 23, 1978 SUMMER filed suit in United States District Court, Southern District of Florida. The Complaint (Appendix A-19) was in nine counts, and named Petitioner as defendant in Counts I through VII on the following theories:

a) Count I — based upon section 10b of the Securities and Exchange Act of 1934, 15 U.S.C.A. § 78j(b) and Rule 10(b)-5 of the Securities and Exchange Commission

b) Counts II and VI — based upon common law fraud

c) Counts III, IV and V — based upon sections 11, 12(2) and 17 of the Securities Act of 1933, 15 U.S.C.A. § 77k, 77l(2) and 77g.

d) Count VII — based upon the Florida Blue Sky Law, Florida Statutes §§ 517.21, 517.301.

Petitioner was not named in Counts VIII and IX. Subject matter jurisdiction was predicated on the alleged violations of federal securities laws.

The suit named as other defendants LAND AND LEISURE, INC., ARTHUR YOUNG AND COMPANY (the accounting firm which supplied accounting and auditing services to LAND AND LEISURE, INC.) and various individuals who were, at times material to the Complaint, officers or directors of LAND AND LEISURE, INC.

The Complaint alleges Petitioner was responsible for putting together the underwriting group which placed the shares of LAND AND LEISURE, INC. stock into the hands of the public, including the Plaintiff. It further alleges the prospectus prepared contains false and fraudulent statements as well as omissions of material facts necessary to make the statements made therein not misleading.

Motions to dismiss were filed by defendants including Petitioner claiming the suit was barred by the expiration of all possible applicable statutes of limitations. The District Court noted that the allegations contained in SUMMER's Complaint reflected defendants failed to send annual reports or call annual shareholders' meetings from 1971 to date of suit and further that they failed to supply financial information requested. Also SUMMER was aware of such facts in 1971 and 1972 and was further aware of a sharp decline in the value of the stock. The Complaint further alleges that the Petitioner unilaterally suspended trading in LAND AND LEISURE, INC. stock in August 1971 and that SUMMER did not file a state action seeking disclosure of the facts sought until 1977 and the federal claim not until 1978.

The District Court granted the motions to dismiss by Order dated May 2, 1979 (Appendix A-14) noting that SUMMER had sufficient notice in 1971 or 1972 to start the statute of limitations running and the longest available was four years. The ruling was based on observations made from the face of the complaint.

SUMMER filed a timely appeal seeking review of the May 2, 1979 Order of Dismissal, but it was determined not to be a final appealable order under 28 U.S.C. § 1291, and thus, on January 30, 1980, the District Court entered a Final Order dismissing the case as to all defendants. (Appendix A-18.)

A timely appeal was then taken and the United States Court of Appeals, Former Fifth Circuit, rendered its decision on December 28, 1981, (Appendix A-1), which is the decision for which Petitioner seeks review. The appellate Court determined that claims were asserted after the expiration of the applicable statutes of limitations and were barred in the absence of circumstances which would toll the statutes. The decision noted the circumstances which the District Judge found to be requiring diligent inquiry but stated such was not supportable by case law and could not be determined on a motion to dismiss. The decision also found that only conclusory allegations of concealment of fraud by this Petitioner or Defendant ARTHUR YOUNG had been made, which required dismissal, but only on that ground.

The Petitioner seeks review of this decision, as the statutes of limitations have run and the Order of May 2, 1980 entered by the District Court should have been allowed to stand. The record was sufficient to require that determination be made on a motion to dismiss. Petitioner would assert that the decisions of the United States Supreme Court and those of the United States Courts of Appeals for the various Circuits require review and reversal of this ruling.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Petitioner seeks review of the decision of the United States Court of Appeals for the Former Fifth Circuit as this decision has created a state of confusion over the tolling of statutes of limitation in fraud cases brought under federal statutes. The opinion is in conflict both with the law of this Court particularly as set forth in *Wood v. Carpenter*, 101 U.S. 807, (1879), and with decisions of other United States

Circuit Courts of Appeals. As such, administration of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Rules of the Securities and Exchange Commission, already subject of extensive litigation on the tolling issue, has become so uncertain as to require a determination upon which the securities industry and investors may rely.

A. THE FIFTH CIRCUIT'S DECISION IS CONTRARY TO THE RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT

Guidelines in the application of the tolling of the statute of limitations in a fraud case were clearly set forth in *Wood v. Carpenter, id* and in *Bailey v. Glover*, 88 U.S. 636 (1875). The statute of limitations in an action for fraud does not run during a period in which the fraud is concealed so long as there is some reasonable diligence in the making of inquiry regarding the underlying facts. *Wood v. Carpenter, id.* This Court has required that an injured party claiming benefit of the tolling of the statute of limitations must remain ignorant of the fraud without any fault or want of diligence on his part. In *Wood v. Carpenter*, the Court examined the record and felt that proper diligence could have unearthed the alleged fraud.

> "With the strongest motives to action, the Plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the efforts." *id* p. 808.

An examination of the decision of the Former Fifth Circuit in the case at bar discloses an investor who knew that no annual shareholders' meetings were held during or after 1971, who knew that the corporation did not send out annual reports to its shareholders during or after 1971, who knew there were no annual filings with the Securities Exchange Commission after 1971, and further who knew that a sharp decline took place in the value of the stock in 1971 and then pondered those facts for several years beyond the running of

the statute of limitations without making diligent inquiry as to the cause for those circumstances.

> "The bar of the statute may also be avoided by proof of fraud committed under such circumstances as to conceal from the Plaintiff all knowledge of the fraud, and thus prevent him from ascerting his right until a period beyond the time limited by the statute." *Bailey v. Glover, (supra)*, p. 637.

While there have been numerous instances of decisions concerning the tolling of the statute of limitations in the various Circuit Courts of Appeals, the instant case in the Former Fifth Circuit is the first directly contrary to the fundamental principle of diligence upon which the tolling doctrine has developed. The decision effectively allows the imprudent investor to ignore the obvious irregularities and await his leisurely discovery of the facts upon which suit is brought without concern for the statute of limitations. Such decision is totally violative of the underlying principles of the equitable tolling doctrine.

In *Wood v. Carpenter, (supra)*, this Court stated that if the means of knowledge are available to the Plaintiff, the Court imputes knowledge of the underlying facts as well. This principle is applicable where the circumstances underlying the claimed fraud are revealable upon proper investigation. While certain elements of the alleged fraud in the case at bar required Plaintiff to retain counsel for proper investigation, even the most unsophisticated investor could have examined the public records to determine if annual reports had been filed, would have known that no notice of shareholders' meetings or minutes or other reports had been sent to him, and could have examined the real estate listed in the prospectus. The Former Fifth Circuit's decision that a question of fact remained given those circumstances creates precedent that the investor in the Fifth Circuit need not make diligent inquiry or be subject to the doctrine of laches as a condition precedent to seeking the benefit of the tolling doctrine.

A glance at the reporter system reveals that brokers face increasing claims tantamount to establishing them as guarantors of investments made. It is essential to the administration of the securities laws that the complaining investor be required to pursue his rights when obviously questionable circumstances exist. The statutes of limitations are primarily designed to assure fairness to defendants, and the courts should be relieved of the burden of trying stale claims when a plaintiff has slept on his rights. *Burnett v. New York Central Railway Co.*, 380 U.S. 424 (1965). While the various securities laws are remedial in their application, *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5 (5th Cir. 1957), application for relief thereunder based upon alleged fraud must meet the requirements set forth by the Supreme Court when applying the equitable tolling doctrine. The case at bar leaves a decision contrary to the established doctrines enunciated by the Supreme Court, and also in conflict with the decisions of the various United States Circuit Courts of Appeals, and thus is properly subject to review by certiorari by this Court. *United States v. Zacks*, 375 U.S. 59 (1963).

B. THE FORMER FIFTH CIRCUIT'S DECISION CONTRADICTS THE DECISIONS OF THE OTHER CIRCUIT COURTS OF APPEAL

The Former Fifth Circuit in this case has determined:

a) That the circumstances which caused the District Court to dismiss the action with prejudice were not supportable by case law and

b) Based upon the decision of *Azalea Meats, Inc. v. Muscat, (supra)*, the tolling of the statute of limitation could not be determined on a 12(b)6 motion to dismiss or motion for summary judgment.

Such precedent is so contrary to decisions of the other Circuit Courts of Appeals as to frustrate the purposes of the federal tolling doctrine, the Securities Act of 1933 and the Securities and Exchange Act of 1934.

The Second Circuit Court of Appeals has clearly enunciated the rule that the time at which a fraud is known or should have been known to a plaintiff determines the running of the applicable statute of limitation. *Klein v. Bower*, 421 F.2d 338, (2d Cir. 1970), *Berry Petroleum Co. v. Adams and Peck*, 518 F.2d 402, (2d Cir. 1975). Those decisions alone isolate a major conflict with the Former Fifth Circuit's position in that they state that particular circumstances *do* constitute notice to an investor that certain peculiarities exist which require investigation and action if necessary.

Stating that those peculiarities cannot be examined and disposed of by motion to dismiss or for summary judgment escapes the point of both *Klein v. Bower* and *Berry Petroleum Co. v. Adams and Peck*. There, facts appeared on the face of the complaint, which, taken as true, *barred* the bringing of the action. *Klein v. Bower*, p. 344 and *Berry Petroleum Co. v. Adams and Peck*, p. 411. Such direct conflict is disruptive to the determination of statute of limitation questions and the tolling not only in securities cases but all cases based upon federal laws wherein the gravamen of the action is fraud.

The face of the Complaint in the case at bar reveals the following circumstances:

1. The investor knew no shareholder meetings took place from 1971-1977.
2. The investor knew no annual reports were given shareholders from 1971-1977.
3. The investor was aware of a precipitous decline of the stock's value in 1971.
4. The investor knew only one annual filing was made with the S.E.C. from 1971-1977.
5. The investor knew that trading in the particular stock was suspended for a period in August, 1971.
6. The investor did not take action until filing a state court suit in 1977.

7. The federal claim was filed in 1978.

The Former Fifth Circuit isolated the first three of those circumstances and decided that such could not constitute basis for granting a motion to dismiss for expiration of the statutes of limitations. Such precedent is not only inconsistent with case law cited but could strike a death knell to the requirement of due diligence for a plaintiff to claim benefit of the tolling doctrine.

It is not the discovery of all details which starts the running of the statute of limitations. All that the court must consider is whether the information is such as would be sufficient to put plaintiff on notice and inquiry. *Turner v. Lundquist*, 377 F.2d 45, 48 (9th Cir. 1967). Once on inquiry notice the plaintiff must make diligent inquiry and seek to learn the facts which would disclose fraud. *Morgan v. Koch*, 419 F.2d 993 (7th Cir. 1969), *Klein v. Bower (supra), Bailey v. Glover, (supra).* The objective indica of the status of the stock as set forth on the face of the pleading give sufficient basis for a judicial disposition because plaintiff has not acted sufficiently within the applicable statute of limitations. *Berry Petroleum Co. v. Adams and Peck, (supra), Cook v. Avien, Inc.* 573 F.2d 685, 697 (1st Cir. 1978), *Gaudin v. K.D.I. Corporation*, 417 F. Supp. 620, 629 (D. OHIO, 1976).

The investor may not wait for a market rebound to revive his loss. The diligent investor must be reasonably cognizant of the status of his investment and take early steps to appraise those facts which come to his attention and even more so when nondisclosed facts are negligently or fraudulently withheld. *Cook v. Avien, (supra.)*

> "The storm warnings, absent a greater inquiry by the purchasers, were sufficient to initiate the running of the statute of limitations on this cause of action..." *Id* p. 697.

The case at bar sets the investor adrift in the Fifth Circuit to ignore the storm warnings unless those particular warnings

are posted in decisional precedent. Such is not the law in the 1st Circuit, the 9th Circuit or the 2nd Circuit.

The need for this appeal was not generated by merely an inconsistent attitude. The decision of the Former Fifth Circuit has attacked the fundamentals of the federal tolling doctrine. As was correctly noted, the applicable statutes of limitation bar the bringing of this action under the Securities Act of 1933, the Securities and Exchange Act of 1934 and Rule 10b-5. The question was whether given the facts as clearly set forth on the face of the pleadings, the investor could claim benefit of the tolling doctrine and whether this issue was susceptible to decision on a motion to dismiss. Given the circumstances of this case, the decision stands as precedent that there is no effective limit to the time within which an investor may bring an action alleging fraud and concealment.

The running of the statute of limitations may be tolled by the equitable doctrine of fraudulent concealment, but the plaintiff must have remained ignorant of the fraud without any fault or want of diligence or care on his part. *Bailey v. Glover, (supra). Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974). Citing *Morgan v. Koch, (supra),* the Court in *Hupp v. Gray id* noted that circumstances in that case at the very least should have aroused suspicion or curiosity and caused plaintiff to take advantage of an opportunity to investigate. The Plaintiff could not excuse non-discovery when lack of diligent investigation caused the non-discovery. Nor can he claim that the statute does not run until all details are discovered. It is sufficient that he be aware of facts from which he should have been suspicious of a fraud. *Hupp v. Gray, (id* at 996.)

A determination may be made by motion to dismiss or by motion for summary judgment where the running of the statute of limitations is apparent on the face of the complaint. *Jablon v. Dean Witter & Co.*, 614, F.2d 677, 682 (9th Cir. 1980.) Where the investor pleads facts which show no-

tice, allegations that knowledge was not available until a later date do not raise an issue which cannot be determined on motion to dismiss, the pleader having raised the facts where they may be determined as a matter of law. The *Jablon* case further demonstrates that the Former Fifth Circuit opinion stands contrary to that of other circuits in noting that some of the facts known to the investor constituted the very fraud now complained of. It is not the particular facts but the relation of the facts to the wrongs complained of which decide the running of the statute of limitations.

The Former Fifth Circuit's decision that the tolling issue cannot be determined on a 12(b)6 motion is also contrary to *Klein v. Bower*, (supra), *Klein v. Shields*, 470 F.2d 1347 (2d Cir. 1971) and *Hupp v. Gray (supra)*.

The Plaintiff in the case at bar has pled too many facts for the Former Fifth Circuit decision to stand. The *Azalea Meats, Inc. v. Muscat, (supra)* case upon which the decision is based requires decision by the trier of fact on the tolling issue. The facts in this case have been set forth in such detail that to prohibit disposition by motion to dismiss on the tolling issue is error. *Jablon v. Dean Witter & Co. (supra)*. When the investor could have acted on those same facts within the statute of limitations but waited until after the running of the statute, he is barred by his own failure from bringing the action. *Klein v. Shields, (supra.)*

The Former Fifth Circuit decision creates a shock wave in an area of law in which there is an abundance of case law but which is in need of a certain uniformity. Investors and dealers in securities need to know the proper application of the tolling doctrine, and it cannot be treated in the Former Fifth Circuit in a manner substantially contrary to the manner applied in the cited cases in the First, Second, Seventh and Ninth Circuits in other securities cases. There exists a rapidly growing area of litigation under § 17 of The Securities Act of 1933, § 10 (b) of the Securities and Exchange Act of 1934 and Rule 10b-5 of the Securities and Ex-

change Commission applying the tolling rule, and the Former Fifth Circuit decision will draw many more stale claims to the courthouse to the detriment of investors and dealers.

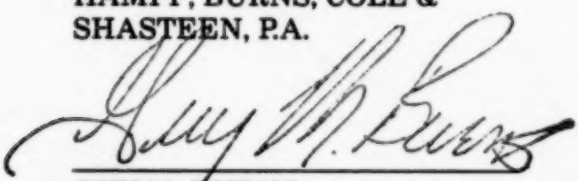
CONCLUSION

The Petition for a Writ of a Certiorari should be granted.

Dated April 17, 1982.

Respectfully submitted:

JACOBS, ROBBINS, GAYNOR, HAMPP, BURNS, COLE & SHASTEEN, P.A.



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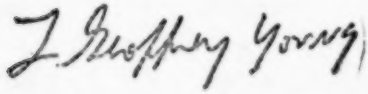

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